Ng Weng Sum v Lembah Beringin Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–1507 OF 2001

AZMEL J

21 SEPTEMBER 2002

Contract *— Termination — Validity — Delay in delivery of vacant possession — Time of the essence — Whether termination of agreement by buyer lawful and valid*

By an agreement ('SPA') dated 31 December 1996, the plaintiff agreed to purchase a piece of property from the defendant. The SPA provided that vacant possession of the property would be delivered by the defendant to the plaintiff within 36 months from the date of the SPA. Time was of the essence in the SPA. A sum of RM285,510.40 had been paid progressively by the plaintiff to the defendant. However, the defendant failed to deliver vacant possession of the property within the 36-month period. In view of the defendant's failure to deliver vacant possession, the plaintiff issued to the defendant a notice terminating the SPA pursuant to s 56 of the Contracts Act 1950. At the same time, the plaintiff demanded for a refund of the sum of RM285,510.40. The defendant disputed the plaintiff's right to terminate the SPA but admitted that there was a delay in delivering vacant possession due to the economic downturn. Under the SPA, the plaintiff was given the option to terminate the SPA if the defendant failed to deliver vacant possession or to wait till a later date and then claim liquidated damages for late delivery. The principal prayer sought by the plaintiff was for a declaration that the termination of the SPA was lawful and effective.

Held, allowing the plaintiff's claim:

(1) The SPA provided that time was of the essence. The allegation that there was economic downturn by itself was not enough to establish a good defence to the plaintiff's claim. Also, the defendant failed to state clearly how the economic downturn had affected the housing project other than stating that its cash flow position was affected (see pp 214I–215B).

(2) If the project was to be delayed, it would be incumbent upon the defendant to obtain the Housing Development Department's permission for extension of time and complete the housing project, giving valid reasons for the cause of delay. No evidence of such extension had been applied for by the defendant. As such, the date of delivery of the said property remained as stipulated in the SPA (see p 215B–C).

(3) Accordingly, the termination of the SPA was lawful and valid. The defendant was ordered to refund a sum of RM285,510.40 paid by the plaintiff (see p 215D–E).

[Bahasa Malaysia summary

Melalui satu perjanjian bertarikh 31 Disember 1996 ('PJB'), plaintif bersetuju membeli sebidang hartanah dari defendan. PJB memperuntuk bahawa milikan kosong hartanah tersebut akan dihantar-serah oleh defendan kepada plaintif dalam tempoh 36 bulan dari tarikh PJB. Masa merupakan inti PJB. Jumlah sebanyak RM285,510.40 telah dibayar secara berperingkat oleh plaintif kepada defendan. Namun demikian, defendan gagal menghantar-serah milikan kosong hartanah tersebut dalam jangkamasa 36 bulan. Memandangkan kegagalan defendan untuk menghantar-serah milikan kosong, plaintif mengeluar notis kepada defendan menamatkan PJB menurut s 56 Akta Kontrak 1950. Pada masa yang sama, plaintif menuntut pengembalian jumlah sebanyak RM285,510.40. Defendan mempertikai hak plaintif untuk menamatkan PJB tetapi mengaku bahawa ada kelewatan dalam menghantar-serah milikan kosong disebabkan kemelesetan ekonomi. Di bawah PJB, plaintif diberi opsyen menamatkan PJB sekiranya defendan gagal menghantar-serah atau menunggu hingga tarikh yang lebih lewat dan kemudian menuntut ganti rugi tertentu atas hantar-serah lewat. Permohonan utama yang dibuat oleh plaintif adalah untuk satu perisytiharan bahawa penamatan PJB adalah sah dan berkesan.

Diputuskan, membenarkan tuntutan plaintif:

(1) PJB memperuntuk bahawa masa adalah inti. Tohmahan bahawa berlakunya kemelesetan ekonomi dengan sendirinya tidak mencukupi untuk membukti pembelaan yang sempurna kepada tuntutan plaintif. Juga, defendan gagal menyatakan dengan jelas bagaimana kemelesetan ekonomi telah menjejaskan projek perumahan selain daripada menyatakan bahawa kedudukan aliran tunainya terjejas (lihat ms 214I–215B).

(2) Sekiranya projek tersebut harus ditangguh, defendan wajib memperolehi izin Jabatan Pembangunan Perumahan untuk perlanjutan masa dan menyelesaikan projek perumahan, dengan memberi alasan sah untuk punca kelewatan. Tiada keterangan tentang perlanjutan telah dipohon oleh defendan. Dengan itu, tarikh hantar-serah hartanah tersebut kekal seperti yang ditetapkan dalam PJB (lihat ms 215B–C).

(3) Maka, penamatan PJB adalah sah. Defendan diperintah mengembalikan jumlah sebanyak RM285,510.40 yang dibayar oleh plaintif (lihat ms 215D–E).]

Notes

For cases on validity of termination, 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3901–3904.

A **Cases referred to**

Kang Yoon Mook Xavier v Insun Development Sdn Bhd [1995] 2 MLJ 91 (folld)

Legislation referred to

B Contracts Act 1950 s 56

WW Wong (*Tee Wong & Teoh*) for the plaintiff.
Robin Lim (*Azhar & Wong*) for the defendant.

C **Azmel J**: The principal prayer sought by the plaintiff in this case was for a declaration that the plaintiff's termination of the sale and purchase agreement between the plaintiff and the defendant dated 31 December 1996 in respect of the purchase of a lot with a two-storey shop/office was lawful and effective.

D The brief facts of the case are as follows. By an agreement dated 31 December 1996, the plaintiff agreed to purchase from the defendant a lot known as Lot No 33, the Crescent-Sector 10-1, Lembah Beringin, situated in the Mukim of Sungai Gumut, District of Hulu Selangor, Selangor, on which a two-storey shop/office was to be constructed by the defendant ('the said property'). The purchase price of the said property was RM381,888.00. Under cl 16.1 of the said agreement, it was provided that E the defendant would deliver vacant possession of the said property to the plaintiff within a period of 36 months from the date of the said agreement. And cl 5 stipulated that time shall be the essence of the contract in relation to all provisions of the agreement.

A sum of RM285,510.40 had been paid progressively by the plaintiff to F the defendant in respect of the purchase price. However, the defendant failed to deliver vacant possession of the said property to the plaintiff upon completion of the 36-month period. In view of the defendant's failure to effect delivery of vacant possession of the said property the plaintiff, through his solicitors, issued a letter dated 27 November 2000 to the defendant giving notice terminating the said agreement. At the same time, the plaintiff G demanded from the defendant a refund of his monies paid to the defendant and also damages. By a letter dated 29 November 2000, the defendant disputed the right of plaintiff to terminate the said agreement and refused to comply with the demands of the plaintiff. However, the defendant admitted there was delay in giving delivery of vacant possession of the said H property caused by the economic downturn, which had severely affected the defendant's cash flow position.

On 2 February 2001, the plaintiff, through his solicitors wrote another letter to the defendant indicating his acceptance in respect of the defendant's repudiation of the said agreement and treated the said agreement as terminated and at the same time demanded the refund of the I sum of RM285,510.40 which was paid to the defendant as part of the purchase price. Since no response was made by the defendant the plaintiff decided to commence this action against the defendant.

The main issue that this court is required to determine in this case is whether the termination of the said agreement by plaintiff was valid and lawfully effective.

The plaintiff argued that cl 5 of the said agreement stipulates that time was of the essence of the contract. It was the defendant's promise to deliver vacant possession of the said property within the period of 36 months from the time of the signing of the said agreement. Because the defendant failed to deliver vacant possession on the expiry of the 36-month period the plaintiff invoked s 56 of the Contracts Act 1950 terminating the said agreement. Under the said agreement, the plaintiff was given option either to terminate the agreement if the defendant failed to deliver vacant possession or to wait till a later date and then claim liquidated damages for late delivery from the defendant. In support of his argument, the plaintiff relied on the case of *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91. In that case, the learned judge ruled that in the absence of any provision in the sale and purchase agreement for the purchaser to terminate the agreement on a breach committed by the vendor, the purchaser can invoke s 56(1) of the Contracts Act 1950 which states:

> Where a party promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The learned judge in *Kang Yoon Mook* further said at p 92:

> As time was provided to be the essence of the agreement, the stipulated time period within which the house had to be delivered to the purchaser became an essential condition of the agreement. As the developer was in breach of this condition, the purchaser was entitled to elect either to rescind the agreement and sue for damages by virtue of ss 56(1) and 65 of the Contracts Act 1950 or to treat the agreement as continuing and sue for damages. The purchaser in this case had rightly exercised his former option. He was entitled to terminate the agreement, obtain the refund of the money he had paid and post-rescissionary damages as envisaged under s 76 of the Contracts Act 1950.

In reply, the defendant argued that the cause for the delay in delivering vacant possession was due to the prevailing economic downturn in 1998 which had adversely affected its cash flow position. The defendant promised to deliver vacant possession when the economy recovered.

In addition, the defendant contended that time was no longer of the essence because the defendant had already informed the plaintiff regarding the new date of delivery of vacant possession. The defendant invoked cl 26 of the said agreement (force majuere clause) which allows the defendant the extention of time to deliver vacant possession of the said property.

After having considered the arguments from both counsels, I arrived at the conclusion that the plaintiff's application be granted. It was clearly stipulated in the said agreement and indeed not disputed by the defendant that time was of the essence of the contract. The allegation that there was

A an economic downturn by itself was not enough to establish a good defence to the plaintiff's claim. It must be assumed that when the defendant decided to commence the work on the said project and entered into sale and purchase agreement with purchasers including the plaintiff, the defendant was financially capable of completing the works in the said project within the time stipulated. In its letter dated 29 November 2000, the defendant
B failed to state clearly how the economic downturn affected the project other than stating that it affected its cash flow position. In what manner and by what reason it was not stated. The defendant also failed to state that delay was something which was outside its control.

Furthermore, if the project was to be delayed, it would be incumbent
C upon the defendant to obtain Housing Development Department's permission for extension of time to complete the said project giving valid reasons for the cause of delay. No evidence that such extension had been applied for by the defendant and no approval for extension of time was given by the Housing Development Department. As such the date of delivery of the said property remained as stipulated in the said agreement.

D In the light of the whole circumstances of this case and for the reasons as I have stated above, I made the following rulings:

(1) The termination of the sale and purchase agreement between the plaintiff and the defendant dated 3 December 1986 by the plaintiff's letter dated 27 November 2000 was lawful and effective.

E (2) The defendant was ordered to refund the sum of RM285,510.40 paid by the plaintiff to the defendant as part payment of the purchase price with interest at the rate of 8% pa from the date of termination to the date of realization.

(3) The plaintiff's claim for liquidated damages was however rejected.

F (4) I also ordered costs of this action be paid by the defendant to the plaintiff.

Plaintiff's claim allowed.

Reported by Lim Lee Na

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